IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 406 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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YUSUFBHAI SULEMANBHAI VADI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR IMRAN PATHAN WITH MR MM TIRMIZI for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 27/09/2007

ORAL JUDGMENT

1. The appellant-orig. convict has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 01st March 2002 passed by the learned Extra Assistant Sessions Judge, Valsad at

Navsari in Sessions Case No.25/97, whereby the learned trial Judge has convicted the appellant for the charge of offence punishable under Section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.3000/- and in default of making payment of fine, he is ordered to undergo simple imprisonment for one year.

2. Shri Imran Pathan, learned counsel appearing for the appellant, has taken me through the judgment and order under challenge as well as the oral and documentary evidence led during the course of trial. It is submitted that the amount fine has been paid by the appellant. The finding of guilt and so also the decision as to the quantum of punishment imposed by the learned trial Judge have been assailed by the appellant on various grounds mentioned in the memo of the appeal. According to Shri Pathan, there is some element of consent and, therefore, the learned trial Judge ought to

have given benefit of doubt to the appellant. The story placed by the prosecution on first sight appears to be improbable and as the victim got married at the age of 19 years, no cogent evidence as to the commission of rape was noticed during the physical examination of the victim. The main submission of Shri Pathan is that the learned trial Judge ought to have appreciated the oral version of the victim and the evidence of other witnesses in the background of improbabilities, so also the time of incident, etc. The appellant has been linked with the crime on the strength of the identity of the bicycle which he was allegedly riding; and the Test Identification parade panchnama also does not inspire confidence because there is infirmity in making arrangements to draw T.I. Parade panchnama. So the first fold of argument of Shri Pathan is that the appellant ought to have been acquitted by the learned trial Judge. However, the second fold of argument of Shri Pathan is that looking to the age of the appellant and

victim, some punishment less than minimum prescribed could have been awarded by assigning reasons. It is in evidence that the husband of the victim had expired after the incident before he could be examined as witness in the matter. It is in evidence that in the village where the appellant resides, the victim and her husband had overstayed and they were proceeding to other village so that they can sell the earthen pots manufactured by them. Undisputedly, the victim was following the cart driven by her husband and at that time, the incident in question has occurred. Even otherwise, as per the say of the prosecution, the appellant had joined the victim on his bicycle. So some physical attraction might have led the appellant-teenager to this lusty act. So in such a situation, keeping the age of the appellant and victim in mind, the learned trial Judge could have awarded some lesser punishment. Merely because the minimum punishment is prescribed, it may not have been imposed

mechanically. Ultimately, the imposition of sentence should carry the true message to the society and similarly, the same should have the element of deterrence. If the sentence of 5 years' rigorous imprisonment had been imposed, it would have met the ends of justice.

3. Ms.D.S. Pandit, learned Additional Public Prosecutor, has strongly resisted the say of Shri Pathan qua the appeal assailing the legality and validity of the judgment and order of conviction and sentence recorded by the learned trial Judge. It is submitted that the married lady aged about 19 years would not have consented to anything when her husband was driving the cart loaded with earthen pots couple of feet ahead. The victim was following the said cart, practically as a watchdog. There might be some distance between the cart and the victim, and the incident has been meticulously narrated by the victim in the complaint as well as in her deposition. There

is neither material contradictions nor modulations in the basic story. Some swelling was also found on the male organ of the appellant when he was examined by the doctor, that too after some hours. It was neither claimed nor submitted before the Court that the appellant is also a married man. Smegma was not present when he was examined. On the other hand, some injury on the body of the victim girl was also found. This shows that she must have struggled. Of course, the husband of the victim could not be examined on account of his untimely death. But the fact remains that the complainant and the Investigating Agency were able to locate the appellant as he had just run away from the spot leaving his bicycle on the road. The said bicycle was identified and the link between the bicycle and the appellant has been established satisfactorily by the prosecution. As the appellant was unknown to the victim, the T.I. Parade was arranged and the appellant was identified by the victim in presence of

Executive Magistrate. There was no reason for the victim lady to implicate the appellant herein in such a grave and serious offence if somebody else had committed the offence. The medical examination of the victim and other evidence, including the report of Chemical Analyser squarely cover the say of the victim.

4. Shri Pathan, learned counsel appearing for the appellant, while responding to the submissions made by Ms.Pandit, learned Additional Public Prosecutor, has fairly submitted that he is not pressing the present appeal against the judgment and order of conviction on merit and this Court may record the finding only qua the second fold of his argument which has been advanced by him.

5. As the appellant has decided not to press the appeal against the judgment and order of conviction, it would not be necessary for this Court to evaluate the evidence afresh considering the scheme of Section 374 read

with Section 386 of the Code of Criminal Procedure, 1973, and the conviction can be upheld by this Court as this Court is in agreement with the reasons assigned by the learned trial Judge for linking the appellant with the crime punishable under Section 376 of the Indian Penal Code.

6. Ms.D.S. Pandit, learned Additional Public Prosecutor, in response to the query raised by the Court has fairly submitted that on the date of incident, the victim was a young lady of about 19 years of age and the appellant who was of 18 years of age at the time of incident, might have committed this offence because of some spontaneous excitement. He might not be a harden criminal. It may be a foolishness on his part. In number of cases, this Court as well as this very Bench has reduced punishment in the cases where the appellant is found to be aged about 20 to 22 years of age. The difference between the age of the accused and the victim is also relevant

in such cases. Here the difference of the age between the appellant and the victim is practically nil. On the contrary, the victim was elder than the appellant. In the causetitle of the judgment, the age of the appellant is shown to be 24 years. But it appears that the learned trial Judge has mentioned the age of keeping in mind the age of the appellant on the date of judgment. On careful reading of various documents which are available on record, it appears that the appellant is aged 18 years at the time of incident in question. The medical certificate Ex.14 shows that the age of the appellant is 18 years. For the satisfaction of the Court, I have carefully gone through the R & P available to the Court and the report submitted by the police under Section 173(2) of the Code of Criminal Procedure, 1973, which show the very same age. The same age is shown in the arrest panchnama of the appellant. The said document is at Ex.19. It is the practice of the police to prepare a separate sheet so

that description of the accused can be kept on record. The said document/ sheet shows that the age of the appellant was 18 years at the relevant point of time. Meaning thereby, the appellant was not of 24 years of age on the date of incident in question. The Court finds that there is enough force in the submissions made by Shri Pathan mentioned hereinabove that even after holding the appellant guilty, the learned trial Judge ought to have applied mind on the point whether this is a case where the punishment minimum prescribed can be awarded or not. True it is that the determination of period of substantive sentence falls under the discretionary jurisdiction of a Judge who conducts the trial. Unless there is compulsion by a statute, the Court can decide the period of sentence. For the offence punishable under Section 376 of the Indian Penal Code, it is not contemplated that the Court cannot impose punishment less than for a term of period prescribed. Minimum punishment is of 7 years. But the proviso authorises the learned

Presiding Officer to exercise discretion if the learned Presiding Officer so desires. On careful reading of the last certain paragraphs of the judgment, it is not possible for this Court to say that the learned trial Judge has recorded any cogent reason for awarding minimum punishment. The question before this Court is that when a Presiding Officer intends to impose the minimum punishment prescribed under the law, whether he is supposed to assign any reasons or not. According to me, in a case where the accused is of 21 years of age and the discretionary jurisdiction has been conferred on the Presiding Officer for awarding punishment less than minimum prescribed, then in all such cases, the Court should record reasons as to why the punishment less than minimum prescribed if awarded would not meet with the ends of justice or such lesser period of punishment would be inadequate in a heinous or ghastly crime or in a case of inhuman behaviour, the Court cannot keep any sympathy in mind but it

is well accepted by our Courts that the scope of reformation of an individual is much more when the accused is a teenager. Therefore only, special provision has been made for the accused persons whose age is below 21 years by incorporating Section 6 in the Probation of Offenders' Act. For short, I accept the say of Shri Pathan and keeping the totality in mind, including the age of the appellant and situation under which the crime has been committed, the substantive sentence is required to be reduced to 5 (five) years. So the present appeal is required to be allowed partly by reducing the substantive sentence to five years instead of seven years.

7. In view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction and sentence dated 01st March 2002 passed by the learned Extra Assistant Sessions Judge, Valsad at Navsari, in Sessions Case No.25 of 1997 is upheld and the substantive

sentence imposed by the learned trial Judge is modified and reduced to the extent that the appellant now shall undergo rigorous imprisonment for 05 (five) years instead of rigorous imprisonment for 07 (seven) years confirming the indefault punishment, keeping the rest of the part of the judgment and order of conviction and sentence unaltered. If the appellant has already served the aforesaid period of sentence of five years, he shall be set at liberty forthwith, provided he is not required by the Jail Authority for any other purpose.

(C.K. Buch, J)

Aakar